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Attorneys for Plaintiff Sierra Club

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB

Plaintiff.

vs.

UNITED STATES DEPARTMENT OF STATE;
JOHN KERRY, in his official capacity as United
States Secretary of State; and ROSEMARY D.
REID, in her official capacity as Requester Liaison
Division Chief

Defendants.

Case No.

CV 13 2656

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

Freedom of Information Act
Administrative Procedure Act

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This case challenges the U.S. Department of State's ("DOS") failure to provide critical information to Plaintiff, Sierra Club, regarding the DOS evaluation of the proposed Keystone XL tar sands pipeline under the National Environmental Policy Act ("NEPA"), as required by the

FILED

JUN 10 2013

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NC

Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The proposed pipeline would transport 830,000 barrels per day of tar sands crude oil 1,700 miles from Alberta, Canada to the Texas Gulf Coast.

2. The requested information bears directly on the integrity of DOS's evaluation of the proposed pipeline under NEPA, and to some of DOS's central conclusions regarding the impacts of the project. Sierra Club requested documents concerning whether DOS properly screened for conflicts-of-interest in selecting a contractor to prepare the supplemental Environmental Impact Statement ("SEIS") for Keystone XL; and documents on which the SEIS was based. These documents were necessary for Sierra Club to comment effectively on the SEIS before the public comment period for the SEIS closed on April 22, 2013; however, DOS denied Sierra Club's request to expedite production of the documents, and closed the comment period before producing the documents. The DOS has still not produced the documents although DOS's final NEPA review and national interest determination on the proposed pipeline are expected before the end of 2013.

3. Sierra Club has unsuccessfully sought to obtain expeditious processing of its FOIA requests from DOS, including appeals of DOS's denials of those requests. Sierra Club has continued to work to resolve this matter in an amicable fashion, but learned in a meeting with DOS staff on June 5, 2013 that DOS could not provide any estimate of a completion date or make any assurances that the agency will provide responsive documents prior to making its final decision on the Keystone XL pipeline.

4. Both FOIA and NEPA reflect fundamental national commitments to transparent government and informed public participation. By moving forward with its NEPA review and national interest determination, and without providing the public with information it is entitled to

1 on a timetable that allows the public to meaningfully use that information, DOS is frustrating the
2 purposes of these statutes, depriving Sierra Club of its right to information under FOIA, and
3 preventing Sierra Club's members and the public as a whole from engaging in the NEPA process
4 in a meaningful manner.

5
6 5. Without other recourse, Sierra Club now files this complaint to compel DOS to
7 immediately disclose all documents responsive to Sierra Club's FOIA requests, to re-open the
8 public comment period for the SEIS in order to allow for public review of the documents, and to
9 enjoin DOS's final decision on Keystone XL until the public has a meaningful opportunity to
10 submit comments on the requested documents.

11 JURISDICTION AND VENUE

12
13 6. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B), (a)(6)(E)(iii) ("FOIA");
14 28 U.S.C. § 1331 ("Federal question"); 5 U.S.C. §§ 701-06 ("APA"), and 28 U.S.C. §§ 2201-
15 2202 ("Creation of remedy" and "Further relief" provisions establishing power to issue
16 declaratory judgments in cases of actual controversy).

17
18 7. Venue is proper in this judicial district and in this court pursuant to 28 U.S.C.
19 §1391(e)(1)(C) and 5 U.S.C. § 552(a)(4)(B), because defendant is an agency of the United
20 States, and Plaintiff Sierra Club is headquartered and conducts its principle business in San
21 Francisco, California, and resides in this judicial district.

22
23 8. Intradistrict Assignment. Pursuant to Civil Local Rule 3-2(c), assignment to the San
24 Francisco Division is appropriate because Plaintiff Sierra Club is incorporated in California and
25 resides and maintains its headquarters in San Francisco County.

PARTIES

Plaintiffs

9. Plaintiff Sierra Club is the nation's oldest grassroots environmental organization. It has more than 600,000 members nationwide and is dedicated to the protection and preservation of the environment. Since its founding in 1892, Sierra Club has pursued its mission to enjoy, explore, and protect the planet. Sierra Club has large organizing and media departments dedicated to informing the public about actions and projects which may affect them through monthly magazine publications, regular press releases, reports, an extensive website, email, a radio show, films and video, book publications, and newspaper columns.

10. One of Sierra Club's main national initiatives, the Beyond Oil Campaign, tackles the pressing problems of global warming, air pollution, water pollution, and our national dependence on non-renewable energy sources such as oil. A central goal of this initiative is decreasing the destructive impact of tar sands extraction and refining, educating the public on foreign and domestic tar sands projects, and ensuring that government decisions relating to energy development and infrastructure projects are carried out in a transparent manner.

11. Sierra Club has members in every state through which the Keystone XL pipeline would run, including 2,119 members in Montana and 2,069 members in Nebraska. Many of these members live in communities adjacent to the pipeline and own property that would be directly and/or indirectly impacted by the construction and operation of the pipeline. Sierra Club routinely disseminates information to its members and to the public about the proposed Keystone XL pipeline, about DOS's activities in reaching an ultimate national interest determination on the proposed project, and other environmental issues.

Defendants

12. Defendant the U.S. Department of State (“DOS”) is the federal agency charged with determining whether the Keystone XL pipeline “would serve the national interest” under Executive Order 13337. DOS is subject to FOIA and NEPA. As the lead agency in the NEPA process, DOS must prepare an Environmental Impact Statement (“EIS”) to evaluate the direct, indirect and cumulative impacts of the proposed pipeline project, and that analysis serves as the basis of DOS’s national interest determination. DOS’s determination is of vital concern to the public because the proposed pipeline will stretch the heartland of our country, through communities and through sensitive ecosystems that supply water for irrigation to our nation’s agricultural heartland, and put those areas at risk of contamination from oil spills. DOS’s Office of Information Programs and Services is the arm of the agency responsible for responding to Freedom of Information Act requests.

STATUTORY AND REGULATORY BACKGROUND

The Freedom of Information Act

13. The Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et. seq.*, is designed to provide the public the information it needs to meaningfully engage with government decision making, and sets a basic policy of full agency disclosure.

14. FOIA requires records to be made “promptly available” upon request. 5 U.S.C. §552(a)(3)(A)(ii). Agencies shall respond to requests within 20 working days. *Id.* at §552(a)(6)(A). FOIA allows agencies to establish tracked processing systems based on the amount of work or time required to process a request, but does not waive its general response deadlines regardless of track assignments. *See Id.* at §552(a)(6)(D). FOIA requires agencies to process requests with due diligence at all times. *Id.* at §552(a)(6)(D)(iii).

1 15. To further enhance transparency, FOIA requires agencies to grant expedited processing
2 of requests when there is an “urgency to inform the public concerning actual or alleged Federal
3 Government activity.” *Id.* at §552(a)(6)(E)(v)(II). The statute explicitly requires agencies to
4 promulgate regulations for expedited processing of records when such requests “demonstrate[] a
5 compelling need.” *Id.* at §552(a)(6)(E)(i).

6
7 16. Accordingly, DOS’s regulations implementing §552(a)(6)(E) state that DOS “shall” grant
8 expedited processing of FOIA requests when “the information is urgently needed by an
9 individual primarily engaged in disseminating information in order to inform the public
10 concerning actual or alleged Federal Government activity.” 22 C.F.R. § 171.12(b); 5 U.S.C.
11 §552 (a)(6)(E)(v).

12
13 17. DOS regulations define information that is “urgently needed” as that information that
14 “has a particular value that will be lost if not disseminated quickly.” 22 C.F.R. § 171.12(b)(2)(i).
15 An “actual or alleged Federal Government activity” is defined as information concerning “some
16 actions taken, contemplated, or alleged by or about the government of the United States, or one
17 of its components or agencies, including the Congress.” 22 C.F.R. § 171.12(b)(2)(ii).

18
19 18. A DOS decision denying a request for expedited processing can be appealed pursuant to
20 22 C.F.R. § 171.12(c) and 22 C.F.R. § 171.50. A final decision denying a request for expedited
21 consideration is subject to judicial review in federal district court. 5 U.S.C. § 552(a)(6)(E)(iii)
22 and § 552(a)(4)(B).

23
24 19. President Obama has ordered that FOIA “be administered with a clear presumption: In
25 the face of doubt, openness prevails.” Memorandum for the Heads of Executive Departments and
26 Agencies 74 Fed. Reg. 4,683 (Jan. 21, 2009). He ordered that all agencies “should take
27 affirmative steps to make information public.” *Id.*

The National Environmental Policy Act

20. Congress enacted the National Environmental Policy Act ("NEPA") "to promote efforts which will prevent ... damage to the environment," 42 U.S.C. § 4321, by ensuring that government agencies incorporate environmental considerations into their decision-making. *See, e.g.,* 42 U.S.C. § 4332(2). As explained by the Council on Environmental Quality – the agency charged with promulgating binding regulations to implement NEPA, 40 C.F.R. § 1500.3 – NEPA "insure[s] that environmental information is available to public officials and citizens before decisions are made and before actions are taken" so that "public officials make decisions that are based on [an] understanding of environmental consequences." 40 C.F.R. § 1500.1(b),(c).

21. To this end, NEPA's regulations specifically emphasize that "public scrutiny [is] essential to implementing NEPA," *Id.* § 1500.1(b), and that agencies "shall to the fullest extent possible ...[e]ncourage and facilitate public involvement." *Id.* at § 1500.2; *see also* § 1501.4. The State Department's own rules implementing NEPA encourage cooperation with the public and require agency officials to make diligent efforts to involve the public during the NEPA process. 22 CFR § 161.9 (c),(f). Meaningful and effective public participation is one of the cornerstones of NEPA.

22. If a major federal action may "significantly affect[] the quality of the human environment" the acting federal agency "shall" prepare a "detailed statement" – an EIS – that addresses both the "environmental impact of the proposed action" and reasonable alternatives to it. 42 U.S.C. § 4332, *see also* 40 C.F.R. § 1502. Accordingly, the public must be provided an adequate opportunity to review and comment on the agency's analysis during the agency's review process. *See* 22 CFR § 161.9 (f),(g).

23. NEPA regulations require that agency's conducting the NEPA analysis make available "environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act." 40 C.F.R. § 1506.6.

24. When selecting a third-party contractor to prepare an EIS, an agency must select the contractor "to avoid any conflict of interest." 40 C.F.R. § 1506.5. To that end, an agency is required to prepare a disclosure statement that the contractor must execute, specifying that it has "no financial or other interest in the outcome of the project." *Id.*

The Administrative Procedure Act

25. The Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, provides for judicial review of agency actions such as those at issue here. A reviewing court shall hold unlawful and set aside any agency actions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5. U.S.C. § 706(2)(A).

FACTUAL BACKGROUND

The Proposed Keystone XL Pipeline

26. In 2008, TransCanada Keystone Pipeline, LP ("TransCanada") first applied for a Presidential Permit for its proposed Keystone XL pipeline project ("Keystone XL"). The Department of State ("DOS") reviews applications for Presidential Permits pursuant to Executive Order 13337 based on whether a project "would serve the national interest." The originally-proposed Keystone XL Pipeline was designed to transport 830,000 barrels per day of tar sands crude oil from Alberta to the Texas Gulf Coast.

27. When the DOS selected a third-party contractor to prepare the EIS for the first Keystone XL NEPA process, allegations of conflicts-of-interest between the contractor and TransCanada

1 resulted in an investigation by the State Department's Office of Inspector General ("OIG"). The
2 OIG's report found, *inter alia*, that DOS had failed to adequately screen for organizational
3 conflicts of interest in hiring the third-party contractor and recommended that DOS improve its
4 process. Specifically, the OIG report found that DOS failed to independently verify the
5 contractor's responses to its conflict of interest questionnaire, and instead simply took the
6 contractor's statements at face value.
7

8 28. The Department of State has since created a guidance document entitled "Interim
9 Guidance for the Use of Third-Party Contractors in Preparation of Environmental Documents by
10 the Department of State." This document outlines DOS's process for using third-party
11 contractors in preparing environmental documents under NEPA, including requirements for the
12 independent contractor and project applicant to disclose potential conflicts of interest, and for
13 DOS to verify that the contractor can impartially perform the environmental services required
14 under the contract.
15

16 29. Following DOS's denial of the first Keystone XL application, TransCanada divided the
17 project into two separate parts and reapplied for a Presidential Permit for the northern segment
18 on May 4, 2012. Thus, as proposed, the current iteration of the Keystone XL pipeline would
19 transport 830,000 barrels of oil per day between Alberta and Steele City, Nebraska where it
20 would connect with the existing Keystone pipeline system.
21

22 30. The DOS is currently engaged in the process of evaluating the impacts of the proposed
23 Keystone XL pipeline under NEPA.
24

25 **The State Department's Selection of Environmental Resources Management**

26 31. On June 15 2012, the DOS issued a request for proposal ("RFP") seeking third-party
27 contractors to prepare a draft "supplemental environmental impact statement" ("SEIS") for the
28

1 Keystone XL pipeline. The RFP required, *inter alia*, “that all conflict of interest requirements,
2 including with respect to the disclosure of information, have been met and that no disqualifying
3 conflicts are present.”

4 32. On June 28, 2012, Environmental Resources Management (“ERM”) submitted a
5 technical proposal that included responses to DOS’s organizational conflicts-of-interest
6 questionnaire (“OCI Questionnaire”).

7 33. The OCI Questionnaire asked: “Within the past three years, have you (or your
8 organization) had a direct or indirect relationship (financial, organizational, contractual or
9 otherwise) with any business entity that could be affected in any way by the proposed work?”
10 ERM selected the box marked “no,” but qualified its answer to state that “ERM has no existing
11 contract or working relationship with TransCanada.”

12 34. The OCI Questionnaire also asked if the applicant is an “energy concern,” which is
13 partially defined as “[a]ny person significantly engaged in the business of conducting research”
14 on the “development, extraction, or transportation by pipeline of crude oil or other energy
15 resources.” ERM answered that it was not an energy concern.

16 35. ERM is a dues-paying member of the American Petroleum Institute (“API”), a trade
17 association who’s stated purpose is to promote the interests of the petroleum and natural gas
18 industry. API has been a steadfast advocate for the Keystone XL pipeline. ERM failed to
19 disclose that it is a member of API on the OCI Questionnaire.

20 36. ERM has an extensive list of current or past oil industry clients that could stand to benefit
21 from the proposed Keystone XL project, including but not limited to Plains All American
22 Pipeline, Total, Shell, Chevron, Syncrude, and Saudi Aramco. ERM failed to disclose these
23 clients on the OCI Questionnaire.

1 37. ERM employees who ultimately helped prepare the draft SEIS for Keystone XL had
2 previously worked on other TransCanada projects, but ERM failed to disclose this on the OCI
3 Questionnaire.

4 38. The DOS announced on its website that it “selected Environmental Resources
5 Management (known as “ERM”) to serve as an independent third-party contractor for its
6 environmental review of the proposed Keystone XL pipeline project,” and that the selection was
7 made “in accordance with its Interim Guidance.”
8

9 39. There is no documentation to suggest that DOS conducted any independent verification
10 of, or took any steps to confirm, ERM’s responses to the OCI Questionnaire as required by the
11 Interim Guidance or 40 C.F.R. § 1506.5.
12

13 40. Recognizing the public’s interest in ensuring the legitimacy and objectivity of the
14 Keystone XL NEPA process, DOS announced on March 1, 2013 that it had “posted a copy of the
15 Environmental Resources Management (ERM) contract and organizational conflicts of interest
16 disclosures” on its website.

17 41. Among the documents that DOS posted on its website was ERM’s technical proposal.
18 However, the DOS redacted all information from that document detailing the past experience of
19 each member of ERM’s Keystone XL team. Un-redacted versions of these reveal that several
20 members of the ERM team previously worked on TransCanada projects as well as other projects
21 affected by Keystone XL.
22
23

24 **The Keystone XL Draft Supplemental Environmental Impact Statement**

25 42. DOS published the draft Supplemental Environmental Impact Statement (SEIS) for
26 Keystone XL on March 1, 2013 and announced a 45-day public comment period beginning on
27
28

1 March 8, 2013 that ended April 22, 2013, which is the shortest possible comment period required
2 under NEPA. 78 Fed. Reg. 15012; 49 CFR § 1506.10.

3 43. The draft SEIS found that the impacts of Keystone XL would be insignificant. That
4 conclusion was largely based on the assertion that in absence of Keystone XL, shipments of tar
5 sands crude oil by rail could increase at a rate that would allow for unconstrained growth of tar
6 sands development, and therefore Keystone XL has no connection to increased tar sands
7 development.
8

9 44. DOS failed to make available to the public many of the key documents on which the draft
10 SEIS was based, including studies regarding oil economics and rail capacity projections. The
11 Sierra Club and the public were prevented from reviewing them during the draft SEIS public
12 comment period.
13

14 45. The Sierra Club, the Natural Resources Defense Council (NRDC), and other groups
15 repeatedly requested an extension of the comment period in letters dated March 27, April 8, and
16 April 12, 2013. In a letter to NRDC dated April 19, 2013, DOS rejected the requests for an
17 extension of the draft SEIS comment period.
18

19 **Sierra Club's Freedom of Information Act Requests**

20 46. Sierra Club submitted multiple requests pursuant to the Freedom of Information Act
21 (FOIA), 5 U.S.C. § 552, seeking documents surrounding the DOS's preparation of the draft
22 SEIS.
23

24 47. On March 28, 2013, the Sierra Club submitted a request under the FOIA, (Case Control
25 No. F-2013-05617), seeking all documents relating to the DOS's selection of ERM as a third-
26 party contractor. This request included the following:
27
28

- 1) All documents relating to DOS's evaluation or investigation of potential conflicts of interest presented by awarding the contract to ERM;
- 2) All documents relating to DOS's independent verification of ERM's answers to the Organizational Conflict of Interest Questionnaire;
- 3) All requests for conflict of interest waivers made pursuant to 48 C.F.R. § 9.503, all drafts of such waiver requests, all documents relating to DOS's consideration or processing of such waiver requests, and any decision documents made with respect to such waiver requests;
- 4) All written analyses, including any recommended courses of action for avoiding, neutralizing, or mitigating an organizational conflict of interest, draft solicitation provisions, or proposed contract clauses prepared pursuant to 48 C.F.R. § 9.506;
- 5) All contracts or drafts of contracts to which DOS, ERM, and/or TransCanada are parties that concern the preparation of the SEIS; and
- 6) All documents relating to DOS's decision to redact, omit, or exclude information regarding ERM employees' experience on previous projects from the document titled "ERM Technical Proposal – Parts 4 to 8 (including Organizational Conflict of Interest)".

48. The Sierra Club requested expedited consideration of its FOIA request because the public comment period for the draft SEIS ended on April 22, 2013; a final decision on Keystone XL is expected before the end of 2013; and because the requested information was critical in determining the validity and transparency of the SEIS.

49. On April 5, 2013, DOS denied expedited consideration of Sierra Club's FOIA request without providing specific reasons for its denial. The denial simply listed the criteria for

1 expedited processing set out in 22 CFR § 171.12 and concluded: "Your request does not meet
2 any of the established criteria."

3 50. Sierra Club appealed that denial on April 29, 2013 reiterating that the request meets the
4 criteria for expedited processing under DOS's regulations, because: (1) there exists a compelling
5 need for the information that demonstrates that DOS's environmental review of Keystone XL is
6 free of bias and conflicts; (2) the information is urgently needed because of the limited public
7 comment period and imminent national interest determination; (3) the information concerns an
8 actual Federal government activity – the decision by DOS to select ERM to prepare the SEIS and
9 its review of the Keystone XL pipeline under NEPA, and (4) one of the primary activities of
10 Sierra Club is disseminating information to the public through its monthly magazine, website,
11 media contacts, press releases, newsletters, and its broad-based public education grassroots
12 campaign activities, about Keystone XL and other environmental issues.
13
14

15 51. Specifically, Sierra Club's appeal explained that it has been actively involved in the State
16 Department's evaluation of the Keystone XL pipeline since 2008, and has worked tirelessly to
17 increase public awareness and understanding of the project and DOS's process of evaluating the
18 environmental impacts of the project, and that the Sierra Club's intention is to continue to do this
19 work with the information received through the request. Importantly, if the request is not
20 fulfilled, "the particular value of the information will be lost if not disseminated quickly."
21

22 52. On May 30, 2013, DOS affirmed its decision to deny expedited consideration of Sierra
23 Club's FOIA request without providing further reasoning, again listing the four criteria for
24 expeditious processing under 22 C.F.R § 171.12(b) and stating "Your request and appeal do not
25 meet any of the established criteria."
26
27
28

53. Sierra Club also submitted a FOIA request (Case Control No. F-2013-05087) seeking several key documents on which the draft SEIS is based. Specifically, Sierra Club requested the following seven documents, most of which were cited in the draft SEIS:

- 1) Hart Energy Research Group 2012b. Heavy Crude Oil: A Global Analysis and Outlook to 2035. Hart Energy Research Group. Houston, TX;
- 2) Peters and Co. Limited. 2013. Crude Oil Rail Activity in Western Canada: Rapidly Increasing Exports Provides Some Near-Term Relief for Producers. January 2013;
- 3) Poten and Partners. 2013. US Gulf Crude Oil Export-2015 Outlook (ICF). January 2013;
- 4) RBC Capital Markets. 2013. Energy Insights: Keystone XL-Weighing the Outcomes. February 11, 2013;
- 5) RBC Economics. 2013. Macroeconomic Impact of the WCS/WTI/Brent Crude Oil Price Differentials. January 2013;
- 6) Torq Transloading. 2012. Resource and Contract Requirements Necessary to Make Rail a Fully Integrated Part of Crude Takeaway Infrastructure. Presentation at the Crude Oil Markets, Rail & Pipeline Takeaway Summit. Calgary, AB. October 24 & 25, 2012; and
- 7) Keystone XL Draft Emergency Response Plan (not the Draft Emergency Response Plan for the Keystone I Pipeline).

54. Sierra Club requested expedited processing of this FOIA request because disclosure of these documents is required pursuant to 40 C.F.R. § 1506.6; the documents forms the basis of conclusions reached in the SEIS; and the SEIS serves as the principle document in DOS's

1 analysis of the Keystone XL pipeline. Without an opportunity to review and comment on these
2 documents in a timely manner, the Sierra Club and the public cannot meaningfully participate in
3 DOS's NEPA review of the proposed project.

4 55. On April 3, DOS denied expedited consideration of Sierra Club's FOIA request without
5 providing specific reasons for its denial. The denial simply listed the criteria for expedited
6 processing set out in 22 CFR § 171.12 and concluded: "Your request does not meet any of the
7 established criteria."
8

9 56. Sierra Club appealed that denial, arguing that it meets DOS's criteria for expedited
10 processing because there is a compelling need to ensure the underlying validity of the SEIS; the
11 information is needed urgently in light of DOS's imminent decision and to provide for
12 meaningful public participation; the information is connected to a Federal activity, which is
13 DOS's NEPA review of the Keystone XL pipeline and ultimate national interest determination;
14 and that Sierra Club is fully engaged in the dissemination of this critical information to its
15 members and the public.
16

17 57. On May 30, 2013, DOS affirmed its decision to deny expedited consideration of Sierra
18 Club's FOIA request without providing further reasoning, again listing the four criteria for
19 expeditious processing under 22 C.F.R § 171.12(b) and stating "Your request and appeal do not
20 meet any of the established criteria."
21

22 58. On June 5, 2013, the Sierra Club held a phone conference with DOS employees assigned
23 to its FOIA requests for Keystone XL. Sierra Club notified DOS that it had obtained several of
24 the documents requested in FOIA Case No. F-2013-05087, and as such, it narrowed its request to
25 the following two documents: (1) Hart Energy Research Group 2012b. Heavy Crude Oil: A
26 Global Analysis and Outlook to 2035. Hart Energy Research Group. Houston, TX; (2) Keystone
27
28

1 XL Draft Emergency Response Plan (not the Draft Emergency Response Plan for the Keystone I
2 Pipeline). These documents were central to some of the key conclusions contained in the draft
3 SEIS.

4 59. During the June 5th phone conference, DOS stated that it was unable to provide an
5 estimated completion date for Sierra Club's FOIA requests or any assurance that the requests
6 would be completed before DOS made a final decision on the Presidential Permit application for
7 Keystone XL.
8

9 CLAIMS FOR RELIEF

10 CLAIM 1

11 DOS Violated FOIA, Applicable Regulations and the APA by Failing to Expedite 12 Processing of Sierra Club's Request for Agency Documents Relating to its Selection of 13 ERM to Prepare the DSEIS

14 60. Plaintiff realleges, as if fully set forth herein, each and every allegation contained in the
15 preceding paragraphs.

16 61. DOS has wrongly denied expedited processing of Sierra Club's FOIA request for all
17 agency documents relating to its evaluation or investigation of potential conflicts of interest
18 presented by awarding the contract to ERM, including but not limited to documents
19 demonstrating independent verification of ERM's answers to the Organizational Conflict of
20 Interest Questionnaire; requests for conflict-of-interest waivers and documents relating to DOS's
21 consideration or processing of such waiver requests; written analyses recommending courses of
22 action for avoiding, neutralizing, or mitigating an organizational conflict of interest; contracts or
23 drafts of contracts to which DOS, ERM, and/or TransCanada are parties that concern the
24 preparation of the Keystone XL pipeline SEIS; and documents relating to its decision to redact
25 information regarding ERM employees' experience on previous TransCanada projects.
26
27
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62. To date, DOS has not provided the documents requested by Sierra Club in its FOIA request.

63. DOS's failure to expedite processing of Sierra Club's FOIA request for the above mentioned agency documents violates the letter and intent of FOIA, 5 U.S.C. § 552 and DOS's own regulation, 22 C.F.R. § 171.

64. DOS's decision denying expeditious processing of Sierra Club's FOIA request is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and is a violation of the APA, 5 U.S.C. § 706(2)(A).

65. Sierra Club has exhausted the applicable administrative remedies with respect to Sierra Club's FOIA request (Case Control No. F-2013-05617) concerning the procurement of ERM to prepare the Keystone XL pipeline SEIS.

66. Sierra Club is entitled to injunctive relief compelling the immediate release and disclosure of the requested agency documents and records, and the opportunity to review and comment on these documents during DOS's NEPA review of the Keystone XL pipeline.

CLAIM 2

DOS Violated FOIA, Applicable Regulations and the APA by Failing to Expedite Processing of Sierra Club's Request for Documents Upon which DOS's Evaluation of the Keystone XL Pipeline Relies

67. Plaintiff realleges, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

68. DOS has wrongly denied expedited processing of Sierra Club's FOIA request for the following documents: (1) "Heavy Crude Oil: A Global Analysis and Outlook to 2035" prepared by the Hart Energy Research Group in 2012 and (2) Keystone XL Draft Emergency Response Plan (not the Draft Emergency Response Plan for the Keystone I Pipeline).

69. To date, DOS has not provided the documents.

70. DOS's failure to expedite processing of Sierra Club's FOIA request for the above mentioned agency documents violates the letter and intent of FOIA, 5 U.S.C. § 552 and DOS's own regulation, 22 C.F.R. § 171.

71. DOS's decision denying expeditious processing of Sierra Club's FOIA request is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and is a violation of the APA, 5 U.S.C. § 706(2)(A).

72. Sierra Club has exhausted the applicable administrative remedies with respect to Sierra Club's FOIA request (Case Control No. F-2013-05087) for documents upon which the Keystone XL SEIS relies.

73. Sierra Club is entitled to injunctive relief compelling the immediate release and disclosure of the requested documents, and the opportunity to review and comment on the documents during DOS's NEPA review of the Keystone XL pipeline.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests this Court to find for Plaintiff and to enter a judgment:

a. Declaring that DOS' denial of Sierra Club's requests for expedited processing of its FOIA requests (Case control Nos. F-2013-05167 and F-2013-05087) were arbitrary and capricious and in violation of the FOIA, 5 U.S.C. § 552(a)(6)(E)(v)(II), DOS regulation 22 C.F.R. § 171.12, and the APA, 5 U.S.C. § 706(2)(A);

b. Issuing preliminary and permanent injunctions: (i) ordering DOS to immediately provide all records responsive to Sierra Club's FOIA requests; (ii) ordering DOS to re-open the public comment period for the draft SEIS to allow for public review and

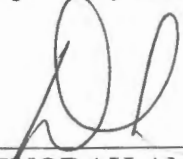
comment of the responsive documents; and (iii) enjoining DOS's issuance of a Record of Decision ("ROD") for the Keystone XL Presidential Permit application until Plaintiff and the public have an opportunity to review the responsive documents and use them in their comments on the SEIS;

c. Awarding Sierra Club its reasonable attorney fees and costs in this action pursuant to 5 U.S.C.A. § 552(a)(4)(E)(i);

d. Providing for any other such relief as the Court deems just and appropriate.

Dated: June 10, 2013

Respectfully submitted:



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